

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Burlington Northern Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on May 22, 2001, when it issued the Claimant, Mr. A. R. Morse a Formal Letter of Reprimand for allegedly not being alert and attentive resulting in a personal injury.
2. As a result of the violation referred to in part (1), the Carrier shall remove the discipline mark from the Claimant's personnel record and make him whole for any time lost." [Carrier's File 14-01-0111. Organization's File 10-1313-018.CLM]

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, Mr. A. R. Morse, was hired by the Carrier in 1976. His personal record shows only one previous disciplinary entry, ten demerits in 1990. On March 30, 2001, he was ordered to attend an investigation on April 10, 2001, "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly report a personal injury and your alleged failure to be alert and attentive when you sustained a personal injury on Wednesday, March 28, 2001, while assigned as Track Inspector at Chillicothe, Illinois."

The investigation was twice postponed at the request of the Claimant's representative. It was finally held on May 10, 2001. The Claimant was represented by the Organization's Vice General Chairman.

The investigation transcript describes the following events. The Claimant stated that on March 28, 2001, as he was operating a lever on a Hi-Rail truck, which raises and lowers retractable flanged wheels for use on the track, a plastic or rubber cover or grip on the lever handle slipped off while the Claimant was exerting physical force to raise the lever. This resulted in his hand suddenly moving upward, striking his cheekbone and causing his thumb to "poke" his eye. Although he described the occurrence as painful, he said he did not view it as a serious injury. Nowhere in the investigation transcript is the time of this occurrence recorded.

The Claimant said that he awakened from sleep at about 12:30 a.m. on March 29, felt pain in his eye, and thought it may have been injured. He therefore went to the hospital, where his eye injury was diagnosed as an abrasion. He was treated at 1:30 a.m., and returned home about 2:00 to 2:15 a.m. He did not feel it necessary to awaken the Roadmaster at that hour to apprise him what had happened. He said he did not know he was injured until he awoke in pain and obtained a physician's diagnosis. He considered the injury to be a minor thing.

At about 6:00 a.m. that same day, March 29, the Claimant reported to Roadmaster Angel Alvarez that he had injured his eye on the preceding day, and had gone to the hospital for treatment. He did not require any time off duty as the consequence of this injury. Mr. Alvarez stated his concept of the Carrier's policy on personal injuries, "you report your injury the quickest means available to your supervisor and let him know what occurred and from there we . . . talk to a nurse, and get him any medical treatment that he needs at that time."

The Conducting Officer read into the investigation record Maintenance of Way Operating Rules 1.1.2 and 1.2.5. The Claimant's representative objected to the entry of these rules because they were not cited in the notice of the investigation. The Board addressed a similar objection in Award No. 262: "This issue has been addressed in Awards of Public Law Board No. 6102, involving the same Carrier and Organization, although a different agreement with different language is there at issue. In Award No. 9 of that Public Law Board, the Board held, 'Employees are deemed to have knowledge of the Rules which govern their employment. If unrelated Rules are raised for the first time during the course of the investigation, there might be merit to the objection, but not in this case.'" Further, the Board notes that the Claimant acknowledged his familiarity with these rules. They read as follows:

"1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury."

"1.2.5 Reporting

All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed."

On May 22, 2001, the Carrier's Division Engineer wrote the Claimant, in pertinent part:

"This letter will confirm that as a result of investigation held May 10, 2001, concerning your failure to properly report a personal injury and your failure to be

alert and attentive when you sustained a personal injury on Wednesday, March 28, 2001, while assigned as Track Inspector at Chillicothe, Illinois, you are issued a Formal Reprimand, for violation of Maintenance of Way Operating Rules 1.1.2, *Alert and Attentive*, and 1.2.5, *Reporting*. . . . In assessing discipline consideration was given to your personal record."

This decision was appealed to the Carrier's designated officer, declined by him, and is therefore presented to this Board.

The Board finds that the charge of failing to properly report his injury has been proven. Even those injuries which appear slight or insignificant at first may worsen, or their severity may not be fully apparent until the initial shock has dissipated. Rule 1.2.5 requires that he make immediate report to the proper manager and complete the accident form prescribed by the Carrier. This rule is intended to make the employer aware of conditions which might be conducive to injury, for future avoidance, to ensure that medical attention is promptly and properly given to the injured employee, and to preclude worsening of the injury and further liability by the Carrier.

The Board concludes that the Carrier has not proven the charge of failure to be alert and attentive, however. The record is altogether lacking in evidence that any act of commission or omission by the Claimant resulted in his eye injury. The lever which raises and lowers the Hi-Rail truck's flanged wheels was difficult to operate. The Claimant's undisputed testimony indicates that another vehicle he drives has the same condition¹. He said, "You have to use force to get them to move." This suggests something inherent in the device's design, or a manifestation of normal wear. He could not reasonably have expected the handle or grip to come off the lever while he was exerting the customary force to move it, unless he had previously experienced such an event.

The Board notes that the Organization's appeal addressed the two components of the disciplinary finding by the Division Engineer, discussed in the preceding paragraphs, (1) failure to properly report a physical injury, and (2) failure to be alert and attentive, but the Statement of Claim before this Board names only one of the two, i.e., "not being alert and attentive." The record does not show that the other component was abandoned. Whether the "reporting" offense was omitted inadvertently or purposefully is not known. In any event, the bottom line result is the same.

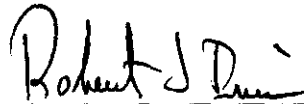
If both issues are properly before this Board, we order that the discipline for "failure to be alert and attentive" shall be deleted from the Claimant's personal record, but the "reporting" charge shall remain. If the "alert and attentive" charge is the only issue before this Board, we

¹Transcript Q. & A. No. 49.

conclude that the Carrier has not borne its burden of proof, and this charge shall be deleted from the Claimant's personal record, in which case the "reporting" charge remains. In either case, the Formal Reprimand for violation of Rule 1.2.5 shall remain undisturbed.

AWARD

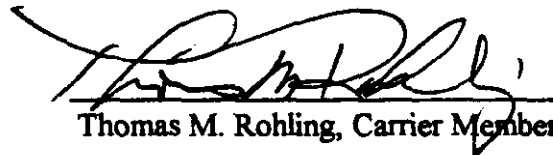
Claim sustained in accordance with the above Opinion..



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

8-20-02

Date